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In the Supreme Court of the United States

OCTOBER TERM, 1977

GULF OIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,
PHILIP R. TELEIN,
EDGAR K. PAREL,
Attorneys,
Federal Energy Regulatory Commission,
Washington, D.C. 20426.

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The Solicitor General submits this brief on behalf of the Federal Energy Regulatory Commission.[1]

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[1]On September 30, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Pub. L. 95-91, 91 Stat. 565, and Executive Order 12009, 42 Fed. Reg. 46267, the Federal Power Commission ceased to exist. Most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, as an independent commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705 of the DOE Act, 91 Stat. 606-607, provide for the substitution of the Federal Energy Regulatory Commission for the Federal Power Commission in pending litigation such as this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 563 F. 2d 588. The Federal Power Commission's Opinions No. 780 and 780-A (Pet. Apps. D and E), issued October 15, 1976, and December 9, 1976, are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1977 (Pet. App. C). Gulf's petition for rehearing was denied on September 26, 1977 (Pet. App. B). Gulf's petition for a writ of certiorari was filed on October 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

Sections 4, 7(b), 7(c), 7(e), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, 822, 824, 830, 831 , as amended, 15 U.S.C. 717(c), 717f(b), 717f(c), 717f(e), 717o, and 717r(b), are set forth at Pet. App. F, pp. 117a-124a. Sections 1, 2, 3, and 4 of the Federal Arbitration Act, 9 U.S.C. 1, 2, 3, and 4, are set forth at Pet. App. F, pp. 124a-127a.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission had authority to determine petitioner's obligations to deliver natural gas to an interstate customer under a certificate of public convenience and necessity issued pursuant to Section 7(c) of the Natural Gas Act before a board of arbitrators had determined petitioner's obligations under the related gas sales contract.

2. Whether the Commission had authority under the Natural Gas Act to order petitioner to remedy its breach

of its certificate obligations by paying to its interstate purchaser, for past delivery shortfalls, an amount that petitioner will be able to recoup, pursuant to the Commission's order, as it completes performance of its delivery obligations.

3. Whether the Commission correctly determined petitioner's delivery obligations under the certificate.

STATEMENT

In 1963 petitioner Gulf Oil Corporation (Gulf) and Texas Eastern Transmission Corporation (Texas Eastern) entered into a "Precedent Agreement" whereby they agreed to enter into a gas sales contract, on terms specified in the Precedent Agreement, upon the receipt of certificates from the Federal Power Commission under Section 7(c) of the Natural Gas Act authorizing the sale called for in the agreement and the contract.

The Precedent Agreement, and subsequently the sales contract (hereinafter collectively referred to as the "contract"), specified a "Daily Contract Quantity" of 500,000 Mcf (thousand cubic feet) of gas per day. The contract stated that Gulf (Pet. App. A, p. 49a):

> warrants and agrees that there will be provided under the terms and provisions of this Agreement a quantity of gas sufficient to enable [Gulf] to have available for delivery hereunder on any day or days a volume not less than one hundred twenty-five per cent (125%) of the Daily Contract Quantity * * *.

Correspondingly, Texas Eastern had the right "to purchase from [Gulf] hereunder at any time" quantities of gas up to 125% of the Daily Contract Quantity (*i.e.*, 625,000 Mcf). Texas Eastern, in turn, agreed to purchase, or pay for if not taken, "a quantity of gas equal to eighty percent (80%) of * * * the * * * Daily Contract Quantity

* * *." The contract further provided that it would remain in force for 26 years or until Gulf had delivered 4.4 trillion cubic feet (Tcf) to Texas Eastern, whichever occurred first (Pet. App. A, pp. 8a-10a, 49a-52a). The contract fixed a price for the gas sales which has been less than the Commission's area rate (see, *e.g.*, Pet. App. A, p. 29a).

The preamble to the contract recited that Gulf owned or controlled oil and gas properties in southern Lousiana, but the contract provisions did not limit the rights or obligations of the parties to those properties (see Pet. App. A, pp. 48a-52a). The contract also provided for arbitration of "[a]ny dispute arising between Seller and Buyer out of this Agreement * * *" (Pet. App. A, p. 52a).

Gulf applied to the Commission for a certificate authorizing the sale called for in the contract, which was attached to the application. In the application, Gulf emphasized that "the agreement * * * does not commit or dedicate to the contract any specific gas producing leases or fields, and no specific commitment or dedication is intended" (Pet. App. A, p. 16a). In December 1963, the Commission issued to Gulf a certificate for the sale of gas as proposed in the application (Pet. App. D, pp. 69a, 89a).[2]

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[2]This certificate, by specifying the sale of a finite quantity of gas for a finite period, differs from the kind of certificates considered in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, and *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, which authorized sales from specified leaseholds or properties without limit of time. As this Court held, those certificates obligated the holder to continue sales from the designated properties until the Commission permitted abandonment under Section 7(b) of the Act, 15 U.S.C. 717f(b), notwithstanding that the sales were pursuant to fixed-term contracts. Here the Commission's certificate related to a specified quantity of gas rather than to specified gas-producing properties.

Within a few years, Gulf discovered that it had overestimated the reserves of gas underlying the property from which it had expected to satisfy the Texas Eastern contract. In 1971 Gulf and Texas Eastern amended their contract to provide, among other things, for an increase in the sales price and for dedication of specified properties to performance of the contract; Gulf applied to the Commission to amend the certificate accordingly (Pet. App. D, pp. 70a-71a). The Commission denied the application on the ground that Gulf's contractual warranty was unconditional and that there was "no basis for relieving Gulf of its errors at the expense of Texas Eastern's ratepayers" (Pet. App. D, p. 71a). The Commission also found that Gulf had not demonstrated its inability to perform its contract obligations (*ibid.*). Gulf did not seek review of that order.

Since 1971 Texas Eastern has demanded 625,000 Mcf per day from Gulf on all but a few occasions. Gulf's deliveries, however, have been substantially less. In November 1975, the Commission ordered Gulf to show cause why it should not be required to satisfy its certificate obligations. After a hearing, the Commission found that Gulf was in substantial breach of its certificate obligations (Pet. App. D, pp. 67a-93a). The Commission rejected Gulf's contentions that its obligations under its contract, and thus under its certificate, were limited to actual reserves underlying its properties in southern Louisiana; that its maximum contract obligation was only 500,000 Mcf per day; that its failure to perform was excused by mutual mistake of fact, commercial impracticability, and *force majeure* (the Department of the Interior's allegedly unexpected moratorium on offshore lease sales between 1962 and 1972); and that in any event the Commission was precluded from determining Gulf's certificate obligations until its contract obligations had been determined by the arbitration process that Gulf had invoked

under the contract. The Commission concluded, as it had in 1971, that Gulf's contract and certificate unconditionally obligated it to deliver 625,000 Mcf per day and that Gulf was not excused from this obligation because performance would be more expensive than Gulf had originally anticipated (Pet. App. D, pp. 81a-86a). The Commission also noted that since 1971, when it denied Gulf's application to amend the certificate, Gulf had commenced approximately 25 intrastate sales of natural gas (Pet. App. D, p. 77a).

Having found that Gulf had not complied with its certificate obligations, the Commission ordered Gulf to commence delivering 625,000 Mcf per day to Texas Eastern on December 15, 1976, unless Texas Eastern demanded less (Pet. App. D, p. 89a). In addition, with respect to Gulf's prior shortfalls on its delivery obligations, the Commission ordered Gulf to "refund" to Texas Eastern (for further refund to Texas Eastern's customers) an amount of money equal to the total prior shortfall multiplied by the difference between the relevant contract price and the governing Commission area rate, on the ground that this "measure of payment is an equitable estimate of damage to the customers" (Pet. App. D, p. 79a). The Commission also provided, however, that Gulf could recoup the amount it paid in refunds. Thus, if Gulf paid refunds with respect to 300 billion cubic feet (Bcf) of gas that it had failed to deliver, Gulf would be permitted, as it delivered that 300 Bcf of previous under delivery, to charge Texas Eastern for that gas an amount in excess of the contract price that would equal the amount of refunds Gulf had paid (see Pet. App. E, p. 105a). In short, as the court of appeals noted (Pet. App. A, p. 37a), the effect of the "refund" order was merely to deprive Gulf of the present value of the money while

providing some relief to Texas Eastern and its customers for Gulf's breach of its obligations. The order was "nothing more than a temporary performance bond made necessary by Gulf's failure to fulfill the terms of its certificate" (*ibid.*).

Gulf sought review in the court of appeals, attacking the Commission's determination of its contract and certificate obligations, the right of the Commission to decide those issues before the arbitrators did, and the authority of the Commission to order the refund relief. Other parties sought review and generally contended that the Commission's findings and order with respect to Gulf were too lenient. The court of appeals, in a thorough opinion, affirmed the Commission in all respects (Pet. App. A, pp. 1a-47a). Judge Aldisert dissented on the one ground that, while he agreed with the Commission's construction of Gulf's delivery obligations, he believed the Commission should have deferred its decision until after the arbitration invoked under the contract (Pet. App. A, pp. 53a-58a).

ARGUMENT

1. Gulf contends, first, that the court of appeals erred in upholding the Commission's refusal to defer its decision on Gulf's obligations until after the board of arbitrators invoked by Gulf under the contract made their decision (Pet. 12-20). The contention is without merit.

It is the Commission's responsibility under the Natural Gas Act to issue, and ensure compliance with, the certificates of public convenience and necessity provided for by Section 7(c) of the Act. In this case the certificate issued by the Commission incorporated by reference the terms of the gas sales contract. But it is the certificate, not the contract, that establishes and defines Gulf's obligations under the Act (see *Sunray Mid-Continent Oil*

Co. v. *Federal Power Commission*, 364 U.S. 137).[3] And it is the Commission's statutory responsibility to determine, subject to judicial review, the scope of the obligations imposed by the certificate.

Accordingly, the Commission would not be bound by any decision of the arbitrators concerning the meaning of the contract or excuses for non-performance. Gulf does not appear to deny this,[4] but contends that "the Commission should be bound by [the parties'] agreement as to the *procedure* for the initial resolution of interpretation conflicts" (Pet. 19, quoting Judge Aldisert's dissent, Pet. App. A, pp. 57a-58a). Since the arbitrators' decision would have no controlling effect on the Commission, acceptance of Gulf's contention would serve mainly the purpose of delay. It would also effectively divest the Commission of its statutory functions and responsibilities. Here, in the face of what the court of appeals called a "massive" and "blatant" default by Gulf on its certificate obligations to interstate customers (Pet. App. A, p. 38a), it would debilitate the Commission to conclude that it cannot enforce the Act because the

[3]Gulf cites *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, for the general proposition that the Natural Gas Act "evinces no purpose to abrogate private rate contracts as such * * *" (Pet. 14). But as this Court in *Sunray* later explained (364 U.S. at 154-156), *United Gas Pipe Line* merely recognized that the imposition of regulation under the Natural Gas Act did not release parties from their private contracts. A party's responsibilities under the Act, which derive from its certificate, may coexist with its obligations under a private contract. But the Act is paramount; in case of conflict (for example, when contract prices exceed regulated rates), contract terms must yield to the Act.

[4]Gulf disclaims concurrence with the proposition (see Pet. 19, n. 14), but does not squarely challenge it (see *id.* at 19-20).

parties have agreed among themselves to some other method of dispute resolution.[5]

Gulf's reliance on cases reaffirming the principles of the Federal Arbitration Act (Pet. 16-17) is misplaced. None of those cases involve a party's obligation under a regulatory statute. The Arbitration Act was not intended to divest an agency such as the Commission of its regulatory responsibilities to the public.[6]

2. Gulf claims that the Commission had no authority under the Natural Gas Act to order it to pay "refunds" with respect to its defaults (Pet. 20-26). Although the remedy ordered in this case was somewhat novel, the court of appeals correctly found that it was a reasonable response to petitioner's substantial defaults and well

[5]The fact that the arbitration provision was part of the contract that the certificate incorporated by reference does not support a contrary conclusion. As the Commission explained (Pet. App. E, pp. 112-113), the certificate defined Gulf's delivery obligations by reference to the delivery obligations of the contract, but did not modify or alter the procedures by which the certificate obligation would be determined and enforced. Indeed, it is doubtful that the Commission could by its certificate delegate its responsibilities under the Act to some other decision-makers or decision-making process chosen by private parties.

[6]*William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, relied on by Gulf (Pet. 16), is not to the contrary. There the Court emphasized that when conduct constitutes both an unfair labor practice and a breach of a collective bargaining agreement, the authority of the National Labor Relations Board is not exclusive; the parties may still seek enforcement of their agreement in court or before arbitrators, in keeping with the basic purpose of the National Labor Relations Act to promote industrial peace. 417 U.S. at 16. The Commission, however, does have the exclusive authority to enforce certificate obligations under the Natural Gas Act. Moreover, even under the labor laws, this Court has recognized that the Board's ruling on an issue must take precedence over an arbitrator's. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271.

within the Commission's conceded power to enforce compliance with its certificates (Pet. App. A, pp. 31a-39a).

In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777, this Court stated the general principle that "the Commission's broad responsibilities * * * demand a generous construction of its statutory authority"; on the issue in that case, the Court refused to "conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." In this case, the Commission was faced with a substantial breach of Gulf's certificate obligations to deliver gas to interstate customers. To provide some remedy for that breach and to ensure future compliance, the Commission devised what the court below accurately characterized as "a procedure which will ultimately result in a loss to Gulf of nothing more than the time value of the money" (Pet. App. A, p. 37a). Under the circumstances the remedy fashioned was necessary, proper, and reasonably tailored to effectuate the purposes of the Act. See *Mesa Petroleum Co.* v. *Federal Power Commission*, 441 F. 2d 182 (C.A. 5), affirming a refund order in similar circumstances.[7]

3. Gulf also contends that the Commission erred in determining that its delivery obligations under the certificate and the contract were 625,000 Mcf per day (Pet. 27-30). Contrary to Gulf's claim, this is an issue that

[7]*Mobil Oil Company* v. *Federal Power Commission*, 483 F. 2d 1238 (C.A. D.C.), relied on by Gulf (Pet. 24), involved the question whether the Commission could establish rates without utilizing procedures contemplated by the Act. The court's conclusion that it could not has no bearing on the issue of the scope of the Commission's power to enforce its certificates and to remedy violations of the Act.

turns on the language and circumstances of the particular certificate and contract. It is not a question of general importance warranting this Court's review. In any event, the court below analyzed the contract thoroughly and was unanimous, and correct, in affirming the Commission's determination.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT R. NORDHAUS,
General Counsel,

PHILIP R. TELLEEN,
EDGAR K. PARKS,
Attorneys,
Federal Energy Regulatory Commission.

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[8]Gulf's contention appears to be that even though Gulf unconditionally "warrant[ed]" to deliver 625,000 Mcf "on any day," and Texas Eastern had the corresponding right to purchase 625,000 Mcf per day "at any time," these maximum delivery obligations were only intended to apply on certain "peak days" (Pet. 27-30). Gulf does not explain what constitutes a "peak day," or why every day on which Texas Eastern demands 625,000 Mcf is not a "peak day." Gulf does not raise in its petition the other asserted excuses for its default that it raised before the Commission and the court below, such as commercial impracticability and mutual mistake of fact.

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